

BEFORE THE BOARD OF REALTY REGULATION
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-125-RRE REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1247-2007
TREATMENT OF THE LICENSE OF)
NATASHA FRAKER, A LICENSED)
REAL ESTATE PROPERTY MANAGER,)	
License No. 572.)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

The screening panel of the Montana Board of Realty Regulation found probable cause to file the instant complaint against the property manager license of Natasha Fraker. The complaint alleged that Fraker:

(1) violated Montana Code Annotated § 37-1-316(14) (by failing to comply with a board rule regarding the accounting or distribution of a client's property or funds),

(2) violated Montana Code Annotated § 37-1-316(18) (by engaging in unprofessional conduct),

(3) violated Administrative Rule of Montana 24.210.805(3) (by failing to deposit client funds into an account separate from money belonging to the property manager, failing to identify the separate client fund as a "trust account", and commingling trust funds with personal funds),

(4) violated Administrative Rule of Montana 24.210.805(9) (by failing to keep in her office complete records of all funds received on property management transactions),

(5) violated Administrative Rule of Montana 24.210.805(10) (by failing to keep a ledger showing receipts and disbursements of transactions affecting the property),

(6) violated Administrative Rule of Montana 24.210.805(11) (by failing to complete monthly reconciliations of the trust account),

(7) violated Administrative Rule of Montana 24.210.805(12) (by failing to keep permanent records of all funds and property belonging to others which the property manager receives), and

(8) violated Administrative Rule of Montana 24.210.828(1) (which provides that a violation of any of the above mentioned administrative rules committed while the licensee is holding herself out in her professional capacity is a basis for finding that the licensee has committed unprofessional conduct).

As part of the complaint, the screening panel entered a summary suspension against Fraker's license, finding that the public health, safety and welfare required immediate action to suspend Fraker's license.

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on March 16, 2007. The purpose of the hearing was to consider both the underlying circumstances of the complaint as well as the propriety of the summary suspension. Prior to hearing, Fraker admitted that she violated the statutes and regulations cited in the complaint. The hearing proceeded solely on the propriety of the summary suspension and determining the appropriate sanction to be imposed against her license.

Marilyn Njos, Board of Realty Regulation auditor, Licensee Natasha Fraker, and Dustin Fraker testified under oath in this matter. BSD's Exhibits 1 through 10 were admitted by stipulation of the parties. In addition, Fraker's Exhibit A was admitted. Based on the evidence adduced at the hearing as well as the arguments of counsel, the following findings of fact, conclusions of law, and recommended decision are made.

II. FINDINGS OF FACT

1. Fraker has held a Montana property manager's license since the spring of 2005. She obtained the license after her husband, Dustin Fraker, asked her to take over property management duties for three properties he owned as well as properties belonging to a business partner.

2. Prior to obtaining her license, Fraker had no experience in property management. In order to obtain her license, she did, however, take formal classes on property management. During these classes, she was instructed regarding the requisites of the Montana Administrative Rules pertaining to property management. In particular, she was instructed regarding the requirements for maintaining proper accounting of funds and the prohibitions against mingling funds belonging to clients and funds belonging to the property manager.

3. On August 28, 2006, an auditor for the Montana Board of Realty Regulation, Marilyn Njos, performed an audit on Fraker's property management accounts. Approximately

two weeks prior to the audit, Njos contacted Fraker to inform her that the audit would be conducted.

4. Njos found several administrative violations in Fraker's accounting, some of them very serious. Among other things, she found:

(A) Fraker did not keep an operating account that was separate from the clients' trust account and her property manager personal funds were commingled with client funds;

(B) Fraker was not properly accounting for interest on client trust funds;

(C) She did not maintain ledgers as required by Administrative Rule of Montana 24.210.805;

(D) She did not withdraw management fees within 5 days as required by Administrative Rule of Montana 24.210.805;

(E) She paid property management bills out of client trust fund accounts;

(F) She did not maintain signed management agreements with some of her clients.

5. After completing the audit on August 28, 2006, Njos discussed her findings and the violations with Fraker. Fraker responded that she would get things in order. Njos followed up on her audit and discussion with a letter dated September 26, 2006, reiterating to Fraker the problems in her accounting methods and informing her that Njos' findings would be presented to the Board of Realty Regulation. Njos also asked Fraker to inform the Board in writing about the procedural changes that she would be implementing to prevent future violations.

6. On October 2, 2006, Fraker provided the Board with a letter outlining the steps she intended to take to prevent the violations from occurring again. In essence, the letter indicated that Fraker intended to correct all the violations and that she had purchased a computer software program to help with the organization of funds and reports (See Exhibit 3).

7. On October 3, 2006, Njos reported the findings of her audit to the Board. Njos also told the Board that Fraker had responded appropriately to the findings of Njos' audit and that Fraker had indicated that she would correct the problems. The Board told Njos that she should complete a follow-up audit to ensure that the problems had been corrected.

8. Njos then contacted Fraker by letter dated November 13, 2006 to tell Fraker that she would conduct a follow-up audit on December 1, 2006 (Exhibit 4). That letter specifically told Fraker about the information she would have to produce in order for Njos to be able to complete the audit. Njos also provided Fraker a letter of instruction outlining the rules

regarding proper trust accounting procedures to be utilized by property managers (See Exhibit 5).

9. As previously arranged, Njos conducted the follow-up audit on Fraker's business on December 1, 2006. Many of the same problems that afflicted Fraker's accounts in the August audit persisted in the December audit. In addition, new problems surfaced. Among other things:

(A) Fraker did not properly account for the interest on client funds as required by Administrative Rule of Montana 24.210.805;

(B) Service charges were not properly deducted from the accounts in violation of Administrative Rule of Montana 24.210.805;

(C) Personal debts were still being paid from the trust account in violation of Administrative Rule of Montana 24.210.805; and

(D) The trust account was not being reconciled monthly as required by Administrative Rule of Montana 24.210.805.

In essence, most of the problems that had been noted in the August, 2006 audit still existed at the time of the December 1, 2006 audit. Additionally, new problems (e.g., the failure to reconcile monthly the trust accounts) were identified.

10. In addition to the problems noted in Finding of Fact Paragraph 9, Fraker was unable to produce any ledgers for Njos. Fraker attributes this to her inability to properly use the computer software program that she had installed to remedy the problems encountered during the August audit.

11. Njos completed her audit with Fraker and again went over the violations that continued with Fraker's property management. Njos then reported her findings back to the Board of Realty Regulation.

12. At its January 11, 2007 meeting, the screening panel of the Board of Realty Regulation voted to summarily suspend Fraker's license due to the imminent threat that Fraker's practice of property management presented. Fraker had been given two audits, had been apprised after the first audit of the rules violations she had committed, and had promised to fix the problems. Fraker failed to have the problems resolved despite the fact that she had promised to do so, had been given four months to do so, and had known some two weeks ahead of time that a second audit would be conducted on December 1, 2006. Not surprisingly, finding that the protection of the public imperatively required emergency action, the screening panel ordered the summary suspension on this case.

13. Fraker's violations not only in theory, but in fact present a danger to the public. Her inability to properly maintain and be able to call up ledgers presented a very real possibility that a tenant's or property owner's funds might have been lost or at least not have been accounted for. Her failure to abide by the administrative rules even after being given a chance to come into compliance and being advised of how to come into compliance provides a compelling basis for imposition of a period of suspension and a period of probation in order to both protect the public and to rehabilitate the licensee.

14. Fraker is the only licensed property manager in her company. Fraker has made some progress toward fixing the problems she had previously encountered, as shown by her most recently created and reconciled ledgers (admitted into evidence at the hearing as Exhibit A which were created *after* the complaint and summary suspension were ordered in this case). Under the circumstances of this case, these two facts do not obviate the need to impose a period of suspension. The fact that Fraker is the only licensed property manager in her company does not present a mitigating factor since it is the protection of the public that is the focus of the statutes regulating property manager licensees, not the convenience of the licensee's clients. And, while Fraker's implementation of a new computer program in order to properly reconcile trust accounts is laudable, it does not provide a basis for eliminating a component of suspension as part of the sanctions to be imposed. Fraker's repeated inability to properly utilize and safeguard the client trust accounts which she controlled, even in the face of a known second audit, compels the hearing examiner to find that a period of suspension is imperative to impress upon Fraker the need to adhere to statutes and regulations. Impressing upon Fraker the need to adhere to applicable statutes and regulations will serve both to protect the public and rehabilitate the licensee.

III. CONCLUSIONS OF LAW

A. *The Summary Suspension Was Appropriate.*

1. An agency may order summary suspension of a licensee's license pending proceedings against the license if the agency finds "that public health, safety or welfare imperatively requires emergency action" and the agency makes a finding to that effect in its order of summary suspension. Mont. Code Ann. § 2-4-631(3).

2. The screening panel made a finding that the public health, safety and welfare imperatively required summary suspension of Fraker's license. That finding was appropriately incorporated into the notice of action against Fraker's license. The panel's determination thus comported with the procedural requirements of Montana Code Annotated § 2-4-631(3).

3. From a substantive standpoint, the decision to impose a summary suspension was well founded. Here, serious irregularities had been found in Fraker's property management practices as reflected in Njos' initial audit. Fraker was apprised of the irregularities, given the chance to correct them, and informed that she would be audited again within four months. She

was then told almost three weeks in advance of the second audit of the exact time and date of the audit. Despite having been notified of the problems, how to fix them and ample opportunities to fix them, Fraker failed to correct any of the problems by the time of the second audit and in addition exhibited new problems. The screening panel would have been derelict in its duty had it failed to impose the summary suspension under these circumstances. Accordingly, the hearing examiner finds no legal or factual error in imposing the summary suspension in this case.

B. The Appropriate Sanction In This Case Includes A Period Of Suspension And Probation.

1. The licensee conceded that she had violated statutes and regulations as alleged in the complaint. Thus, the only determination left for the hearing examiner on the underlying complaint was the appropriate sanction or sanctions to be imposed in light of the violations.

2. A regulatory board may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may impose a license suspension, probation with terms, and a fine not to exceed \$1,000.00 per occurrence.

3. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the Board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

4. BSD has requested that Fraker be suspended for a period of six consecutive months beginning from the date that the summary suspension was placed on her license, January 11, 2007. In addition, BSD has recommended that Fraker's license be placed on probation for a period of one year and that she pay a fine. Fraker argues in mitigation that the problems were due to her unfamiliarity with various computer programs she utilized and further argues that suspension is too harsh.

The fact that Fraker had problems with a computer program does not present a mitigating circumstance. Fraker is the licensed professional. She has held herself out as having the expertise to accomplish the job and is responsible for her failure to do so, especially since she repeatedly failed to properly execute her duties as a property manager.

A period of suspension is appropriate in this case to impress upon Fraker the need to properly manage properties according to statutory and administrative requisites. While there is no evidence that Fraker has defrauded any client, her slipshod method of management presented the very real potential of such harm. As previously noted, serious irregularities had been found in Fraker's property management practices as reflected in Njos' initial audit. These irregularities included improperly using client trust account funds to pay property management bills, failure to properly account for interest on the trust account funds, commingling funds, and

failing to properly identify client trust funds. At the time of the first audit, Fraker agreed that she would correct the problems and was informed that she would be audited again within four months.

Despite having been notified of the problems and how to fix them, and having ample opportunities to fix the problems, Fraker failed to correct any of the problems by the time of the second audit. In fact, Fraker exhibited additional problems with her property management practices. In light of her failure to correct the problems when she knew that she would be facing a second audit and potential sanctions if she failed the audit, simply placing her on probation will not impress upon her the need to comport with the statutory and administrative requisites for safeguarding client funds. A period of suspension is necessary both to ensure the protection of the public and to rehabilitate Fraker's method of practice.

While the hearing examiner agrees that Fraker's license should be suspended and placed on probation, he is not persuaded that a fine is appropriate in this case. If the following recommended order is approved by the Board, Fraker will be enrolling in continuing education at her own expense which cost will likely meet or exceed the nominal fine that the BSD has sought with the additional benefit that Fraker will actually be learning to be proficient in her chosen profession. This sanction will be far more beneficial to the protection of the public than merely levying a fine.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board enter its order placing Fraker's license on probation for a period of 12 months from the date the Board's order becomes final with the terms that:

(1) Fraker shall present evidence to the Board within six months of the date that the Board's order becomes final that she has, at her own expense, enrolled in and successfully completed at least 8 hours of continuing education as approved by the Board;

(2) Fraker shall at all times comport with the requirements of Montana Codes Annotated Title 37, Chapter 1 and Montana Codes Annotated Title 37, Chapter 51, subpart 6 and Administrative Rules of Montana 24, Chapter 210, Rules 801 through 843; and

(3) Fraker's property manager's license Number 572 shall be suspended from January 11, 2007 until July 11, 2007.

DATED this 27th day of March, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT

GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.